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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF MARYLAND,
Petitioner,

v.

BRUCE LAMONT DENNIS,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In its first opinion in this case, the Court of Appeals of Maryland held that a police officer conducting a traffic stop may not order a passenger to remain in the car unless the officer subjectively intends to detain the passenger under the authority of *Terry v. Ohio*, 392 U.S. 1 (1968). Maryland petitioned this Court to review that judgment and presented two arguments in support: (1) the case would be controlled by the then-pending decision of this Court in *Maryland v. Wilson*; and (2) the state court's decision conflicted with *Whren v. United States*, 116 S. Ct. 1769 (1996). This Court granted certiorari, vacated the state court's judgment and remanded to that court for reconsideration of its opinion in light of *Whren*. On remand, the Court of Appeals reaffirmed its original opinion and judgment, holding that *Whren* is inapposite to this case, and that it would not decide the case under the dictates of *Wilson*, which was decided three months before the Court of Appeals issued its second opinion. The questions presented by this petition are:

1. Where the facts and circumstances give rise to a reasonable suspicion to detain a person under the authority of *Terry v. Ohio*, is the subjective intent of the officer irrelevant to the lawfulness of the detention under the Fourth Amendment?

2. When a police officer has lawfully stopped a motor vehicle, does the Fourth Amendment permit the officer to order passengers to remain in the vehicle during the encounter?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS AND ORDERS

The reported opinion of the Court of Appeals of Maryland on remand from this Court, *Dennis v. State*, 345 Md. 649, 693 A.2d 1150 (1997), reversing the judgment of the Court of Special Appeals of Maryland is reproduced in Appendix A. (App. 1a-17a).

The reported opinion of this Court, *Maryland v. Dennis*, 117 S. Ct. 40 (1996), granting the petition for writ of certiorari, vacating the judgment of the Court of Appeals of Maryland, and remanding the case to that court for further consideration is reproduced in Appendix B. (App. 18a).

The reported opinion of the Court of Appeals of Maryland, *Dennis v. State*, 342 Md. 196, 674 A.2d 928 (1996), reversing the judgment of the Court of Special Appeals of Maryland is reproduced in Appendix C. (App. 19a-39a).

The unreported per curiam opinion of the Court of Special Appeals of Maryland, *Dennis v. State*, No. 387, Sept. Term, 1994 (filed December 9, 1994), affirming the judgment of the Circuit Court for Somerset County is reproduced in Appendix D. (App. 40a-44a).

The March 16, 1994 ruling of the Circuit Court for Somerset County, Maryland in *State v. Dennis*, Criminal Case No. 94-CR-03526, finding Dennis guilty of disorderly conduct and battery is reproduced in Appendix E. (App. 45a-46a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing Dennis's convictions was filed on May 19, 1997. This petition is filed within ninety days of that judgment, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 27, 1993, Officer Wayne Foskey of the Princess Anne, Maryland Police Department saw a vehicle drive through a red traffic signal. (App. 20a). Officer Foskey and his partner activated the emergency lights on their police car and pursued the vehicle, intending to effectuate a traffic stop. (*Id.*). The driver of the vehicle ignored the emergency lights and increased his speed. (*Id.*). Officer Foskey then pulled alongside the vehicle, shined his flashlight inside, and commanded the driver to pull over. (*Id.*). The driver ignored the command to stop and began to drive even faster. (*Id.*).

After a lengthy chase during which the driver ignored repeated commands to stop, the police ultimately blocked the vehicle in a private driveway in a residential area where five or six persons were gathered. (*Id.*). Officer Foskey, his partner, and a third officer, Trooper Bettina Collins, were on the scene. (*Id.*). The individuals who were gathered in the area were yelling at the police and "saying things to Dennis and the other subject." (App. 21a). The driver and Dennis, the passenger, opened the car doors and began to exit the vehicle. (App. 20a). Officer Foskey, who was focused on Dennis, "yelled for him to shut the car door and stay in the vehicle." (*Id.*). Ignoring the command to remain in the vehicle, Dennis stepped out of the vehicle and started to walk away. (App. 21a). Officer Foskey again commanded Dennis to stop, but Dennis ignored him and continued to walk away. (*Id.*).

Dennis ignored Foskey's command to get down on the ground, (App. 45a), causing the officer to tackle him, (App. 21a). Dennis struck the officer in the ribs and began fighting with him. (*Id.*). Officer Foskey sprayed Dennis with pepper mace and managed to get him back into the vehicle. (*Id.*). Dennis was arrested and charged with disorderly conduct, battery, hindering a police officer, and resisting arrest. (App. 20a n.1, 21a).

In finding Dennis guilty of disorderly conduct and battery, the trial court found that Officer Foskey was permitted to command Dennis to remain in the vehicle in order to identify him and ensure officer safety. (App. 45a). Noteworthy to the trial court were the facts that the driver of the vehicle had just engaged the police in a high speed chase and that there were individuals in the immediate area who were "yelling and shouting at the

officers." (*Id.*). The trial court also found that, because Dennis's refusal to comply with Officer Foskey's lawful order threatened the public peace, the officer was justified in physically restraining Dennis. (*Id.*).

Dennis appealed his convictions to the Court of Special Appeals of Maryland, which affirmed in an unreported per curiam opinion. (App. 40a-44a). The Court of Appeals of Maryland granted certiorari to review the judgment of the Court of Special Appeals of Maryland. Maryland's highest court framed the issue this way:

> This case presents the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention.

(App. 19a).

After determining that Dennis's conduct in disobeying the police command to stop did not pose "any real danger of a breach of the peace," and, therefore, could not sustain his disorderly conduct conviction, (App. 26a), the court addressed the lawfulness of Dennis's seizure under *Terry v. Ohio*, 392 U.S. 1 (1968). (App. 27a-38a). The court reasoned that whether a passenger in a traffic stop situation is subject to stop or arrest depends on the facts and circumstances relating to the passenger, and that the actions of the driver are not automatically attributable to the passenger. (App. 29a). According to the court, the officer's entitlement to detain Dennis turned on whether the officer had "an articulable basis for believing that [he] was somehow involved, other than as a passenger, in the commission of [the driver's] crime." (App. 29a). In this

regard the court stated:

> It is only when the passenger's actions are consistent with those of an accessory or aider and abettor that a police officer has a basis for focusing on and/or charging the passenger.

(App. 30a).

The Court of Appeals held that Officer Foskey commanded Dennis to stop, not to determine whether Dennis had aided and abetted the criminality of the driver, but to ensure the officer's safety. The court held that the "officer safety" rationale for detaining Dennis did not constitute "the requisite reasonable suspicion *Terry* requires." (App. 34a). The court believed that in order for the stop of Dennis to have been lawful, the officer must have

> articulated a reasonable suspicion that [Dennis] was engaged in the criminal conduct for the investigation of which the stop was made . . . The police officer must intend the stop to be an investigative stop, not just a detention for safety purposes.

(App. 33a-34a).

Because the subjective intention of Officer Foskey in detaining Dennis was to ensure his and the other officers' safety, not to investigate suspected criminal activity on Dennis's part, the Court of Appeals of Maryland concluded that the detention was unlawful. (App. 37a-38a). On this basis, the court reversed Dennis's convictions for disorderly conduct and battery. (App. 26a, 38a-39a).

Petitioner thereafter filed a Motion for Reconsideration of the Court of Appeals' opinion. Petitioner requested that the court reconsider, inter alia: (1) its holding that a police

officer involved in a lawful traffic stop must have a reasonable suspicion of criminal behavior on the part of the passenger before ordering the passenger to remain in the vehicle during the stop; and (2) its holding that analysis of any *Terry*-type encounter requires consideration of the officer's subjective concerns.

The court denied the motion, (App. 19a), causing Petitioner to file in this Court a petition for writ of certiorari seeking relief on two alternative bases. Petitioner asked that this Court hold the petition pending decision in *Maryland v. Wilson*, 117 S. Ct. 882 (1997).[1] In the alternative, Petitioner asked that the petition be granted, the state court's judgment vacated, and the case remanded in light of this Court's decision in *Whren v. United States*, 116 S. Ct. 1769 (1996), which had issued nine months before the Court of Appeals rendered its initial decision in this case. As to the latter basis, Petitioner argued that the Court of Appeals' opinion contravened *Whren*'s holding that the constitutional reasonableness of a traffic stop does not depend on the actual motivations or subjective intentions of the officer involved, but, rather, on whether the "circumstances, viewed objectively, justify that action." *Id.* at 1774 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). Petitioner relied in particular upon the Court's admonition that

> [s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis . . .

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[1] By the time the petition was filed, this Court had granted certiorari in *Maryland v. Wilson*, *see* 116 S. Ct. 2521 (1996), but had not yet heard argument in the case.

> the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent.

(Pet. for Writ of Cert. at 7 n.1, Maryland v. Dennis (No. 96-112) (quoting *Whren v. United States*, 116 S. Ct. at 1774)).[2] On October 7, 1996, the Court granted the petition, vacated the Court of Appeals' judgment and remanded the case to that court "for further consideration in light of *Whren v. United States*, 517 U.S. ___, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996)." *Maryland v. Dennis*, 117 S. Ct. 40 (1996) (App. 18a).

More than seven months later (and three months after issuance of this Court's decision in *Maryland v. Wilson*), the Court of Appeals, without benefit of further briefs or oral argument, issued an opinion reaffirming its earlier opinion and judgment. (App. 1a-17a). Over the vigorous dissent of one judge, the court concluded: "The issue in this case is different from the issue presented and resolved

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[2] In his Brief in Opposition, Dennis argued that the petition failed to present a case or controversy and that the real issue was one of evidentiary sufficiency not implicating the Fourth Amendment. (Br. in Opp. at 2-5). Petitioner pointed out in its Reply to Brief in Opposition that the battery conviction was directly affected by the Court of Appeals' reversal of that conviction on Fourth Amendment grounds, and that, like *Brown v. Texas*, 443 U.S. 47 (1979), the Fourth Amendment was implicated by the seizure of Dennis, which, in turn, directly led to his battery conviction. (Reply to Br. in Opp. at 1-4). It goes almost without saying that the Court, in granting a writ of certiorari, rejected Dennis's contention that this case rests on state law grounds.

by the Court in *Whren*, and, thus, *Whren* is not dispositive." (App. 5a). The court presumably found dispositive the fact that the specific issue before the Court in *Whren* was the lawfulness of a "pretext" traffic stop, whereas the issue in the instant case addresses the officer's subjectively held intention in conducting a *Terry* stop. (*See* App. 3a-5a).

Having determined that "the principles enunciated in *Whren* [are] inapposite" to this case, (App. 6a), the court reiterated and reaffirmed the conclusions in its first opinion "that there was no reason articulated or indicated as to why it was necessary to detain Dennis 'for the officer's safety,' and the detention could not be justified on any other basis." (*Id.*). In the latter regard, the court repeated the view expressed in its first opinion, (App. 37a-38a), that "although the officer might have had a reasonable suspicion adequate to make an investigatory stop pursuant to *Terry v. Ohio*, the officer did not intend to question Dennis, and a *Terry* investigative stop was not the basis for Dennis' detention." (App. 6a).

As to the issue whether this case could be decided under the rule announced in *Maryland v. Wilson*, the Court of Appeals pointed out that "the issue decided in this case . . . was left expressly undecided in *Wilson*." (*Id.*). Accordingly, the court did not address whether this case could be decided by application of *Wilson* to the instant facts.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Maryland's decision flies in the face of two recent opinions of this Court, *Whren v. United States* and *Maryland v. Wilson*, application of either one of which dictates reversal of the lower court's judgment. While purporting to do otherwise, the Maryland appellate court effectively ignored this Court's clear direction to reevaluate the case in light of *Whren*. The court likewise declined to decide the case in light of *Wilson*, notwithstanding the obvious relevance of that decision to the facts of this case. Either one of these errors warrants review by this Court.

The Court of Appeals' reading of *Whren* ignores the undergirding rationale of that opinion that the lawfulness of Fourth Amendment conduct is generally to be adjudged by an objective standard of reasonableness. The lower court hewed instead to the view expressed in its earlier opinion that the test for reasonable suspicion requisite to the determination of the lawfulness of a *Terry* stop requires consideration of the subjective motivations and intentions of the stopping officer. The Maryland court's view is counter to the majority of cases decided before *Whren* and virtually all of the cases decided since the *Whren* decision.

The Court of Appeals was wrong as well in failing to decide this case by application of the Court's decision in *Maryland v. Wilson*, 117 S. Ct. 882 (1997). *Wilson* holds that an officer making a traffic stop may automatically order passengers to get out of the car. *Id.* at 886. It takes but a small step in logic to conclude that the rationale of that case applies equally to the officer's decision to order persons to remain inside the car. To date, at least two

federal courts and one state court have read the *Wilson* rule as governing an officer's order to passengers to remain *inside* a car during a traffic stop. The instant case conflicts with those decisions.

I.

THE REASONABLENESS OF AN OFFICER'S DECISION TO CONDUCT A *TERRY* STOP IS DETERMINED BY REFERENCE TO THE OBJECTIVE FACTS AND CIRCUMSTANCES AND NOT TO THE OFFICER'S SUBJECTIVE MOTIVATIONS.

The question whether reasonable suspicion for a *Terry* stop is measured solely by reference to the objective facts and circumstances is one that Maryland believes was answered by this Court's decision in *Whren v. United States*. To the extent the Court of Appeals of Maryland ignored *Whren* in deciding the reasonableness of the officer's action in this case, that court was incorrect. Moreover, the Maryland court's decision conflicts with the majority of the federal and state courts. Given the numerous daily applications of *Terry* principles in a myriad of police-citizen encounters throughout the country, the issue raised by this petition deserves review by this Court.[3]

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[3] In the event the Court determines that full plenary review of this case is unwarranted, then summary reversal might be appropriate because the Court of Appeals failed to recognize

The Court of Appeals in this case applied a subjective test to determine the lawfulness of the officer's *Terry* detention of Dennis. The court held that the detention violated the Fourth Amendment because the officer did not subjectively intend to detain Dennis for reason of suspected criminality, (App. 32a, 34a, 36a), and, furthermore, did not articulate this reason in conducting the stop, (App. 34a, 37a). Regarding the latter issue the court said: "Indeed, such an articulation is a condition precedent to a judicial determination that a reasonable suspicion justified the officer's conduct." (App. 34a-35a).[4]

This analysis disregards this Court's admonition in *Whren* that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." 116 S. Ct. at 1775. Furthermore, the analysis rests upon the faulty premise that the probable cause analysis and the *Terry* reasonable suspicion analysis are fundamentally distinct in that the former is entirely objective while the latter has a subjective component.

The Maryland court's understanding of the test for reasonable suspicion conflicts with that of the majority of federal and state courts. Even before this Court decided

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the relevance of *Whren* to the *Terry* situation.

[4] The Court of Appeals also rejected the reason the officer *did* articulate for detaining Dennis, *i.e.*, officer safety. (App. 33a-34a, 37a-38a). The Court of Appeals concluded that this rationale would not support a *Terry*-type detention of Dennis because the officer's suspicion that Dennis might harm the officer or others was not directed at whether Dennis was involved in criminality.

Whereren, most federal and state courts held that the determrmination whether an officer possessed reasonable suspicicion, whether for a stop or a frisk, was made without referenence to the officer's subjective concerns, motivations, or intentions. *E.g.*, *United States v. Arzaga*, 9 F.3d 91, 93 (10th C Cir. 1993); *United States v. Lowe*, 9 F.3d 43, 45 (8th Cir. 1993); *United States v. Cardona-Rivera*, 904 F.2d 1149, 1 1153-54 (7th Cir. 1990); *United States v. Hawkins*, 811 F.2d 210, 214-15 (3d Cir. 1987); *People v. Hughes*, 767 P.P.2d 1201, 1205 (Colo. 1989); *Marbury v. United States*, 540 A.2d 114, 115-16 (D.C. 1985); *State v. Mitchell*, 906 P.2d 1013, 1016 (Wash. Ct. App. 1995); *State v. v. Baudhuin*, 416 N.W.2d 60, 64 (Wis. 1987).

Far fewer courts, but with the Maryland court among them, took the opposite view that the stopping officer must intend d and articulate a basis for the stop which, when analyzed by reference to an objective test, constituted the requisite degree and focus of reasonable suspicion. *E.g.*, *State v. Jamison*, 482 N.W.2d 409, 413 (Iowa 1992); *Jones v. State*, 572 A.2d 169, 173 (Md. 1990); *State v. Cripps*, 533 N.W.2d 388, 391-92 (Minn. 1995). Likewise, two courts adopted the position, in the arrest context, that the reviewing court may not "indulge in *ex post facto* extrapolations of all crimes that might have been charged on a given set of facts at the moment of arrest," and that the offense for which probable cause existed must have been the precise offense, or one reasonably related to, that offense upon which the officer based the arrest. *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971); *State v. Hollis*, 633 A.2d 1362, 1366 (Vt. 1993). It would follow that these courts would have demanded the same subjective intention on the part of the officer conducting a *Terry* stop.

Any doubt of the correctness of the majority view before *Whren* was decided has been effectively eliminated by this Court's opinion in that case. Insofar as Petitioner can determine, no court (with the exception of the state court here) persists in the notion that the subjective intention of the detaining officer is relevant to whether that officer has reasonable suspicion to act. To the contrary, the courts consistently take the view that *Whren* applies to the *Terry* reasonable suspicion analysis. As the Court of Appeals for the District of Columbia stated in *United States v. Mangum*, 100 F.3d 164 (D.C. Cir. 1996), upholding a *Terry* stop:

> [E]ven if appellant had produced evidence showing that the officers intended to arrest appellant prior to stopping him and finding the gun, such evidence would be irrelevant. In determining whether a stop or search is reasonable under the Fourth Amendment, courts look to objective evidence, not subjective intentions.

Id. at 170 (citations to *Whren* and *Terry* and footnote omitted). In the same vein, the Court of Appeals for the Eighth Circuit has noted that this Court in *Whren* has "laid to rest" the issue whether an objective test applies to the *Terry* reasonable suspicion analysis. *United States v. Menard*, 95 F.3d 9, 10 n.2 (8th Cir. 1996). Other courts are to like effect.[5]

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[5] *Bordeaux v. Lynch*, 958 F. Supp. 77, 85 n.7 (N.D. N.Y. 1977); *United States v. Gonzales*, 954 F. Supp. 48, 50 (D. Conn. 1997); *United States v. Garcia Hernandez*, 955 F. Supp. 1361, 1370 (D. Utah 1996); *United States v. Zertuche-Tobias*, 953 F. Supp. 803, 822 n.56 (S.D. Tex. 1996); *People v. Perez*,

This case allows the Court to correct the Court of Appeals' error and erase, once and for all, any lingering concern that the subjective intentions of the officer play a role in Fourth Amendment analysis.

II.

THIS COURT'S DECISION OF *MARYLAND V. WILSON* SUPPORTS THE OFFICER'S ORDER THAT DENNIS REMAIN INSIDE THE CAR DURING THE CONDUCT OF THE TRAFFIC STOP.

The second issue presented by this case—the authority of the police during a traffic stop automatically to order passengers to remain in the car—is closely related to the issue decided by this Court in *Maryland v. Wilson*. In *Wilson*, this Court held that the Fourth Amendment permits police in the course of a lawful traffic stop to

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51 Cal. App. 4th 1168, 1178, 59 Cal. Rptr. 2d 596, 602 (1996); *People v. Altman*, 938 P.2d 142, 146 (Colo. 1997); *State v. Rodriguez*, 684 A.2d 1165, 1171 n.17 (Conn. 1996); *State v. Hoppe*, No. C1-96-555, 1997 WL 53018, at *2 (Minn. Ct. App. Feb. 11, 1997); *State v. Thompson*, No. 96 CA 1748, 1997 WL 120212, at *4 (Ohio Ct. App. Mar. 12, 1997); *Pennington v. Commonwealth*, No. 1346-95-3, 1997 WL 39831, at *3 (Va. App. Feb. 4, 1997); *State v. Gaulrapp*, 558 N.W.2d 696, 700 (Wis. 1997); *see also United States v. Anderson*, 114 F.3d 1059, 1065 (10th Cir. 1997) (applying *Whren* to officer's obtaining consent to search); *United States v. Jerez*, 108 F.3d 684, 711-12 (7th Cir. 1997) (Coffey, J., dissenting) (would have applied *Whren* to officer's obtaining consent).

order all occupants out of the vehicle without any particularized suspicion that they pose a threat to the officer's safety. The same rationale as underlies the lawfulness of an order to alight supports the lawfulness of an order to remain inside the car. In both instances, the Fourth Amendment analysis consists of balancing the de minimis intrusion into the passenger's privacy and liberty interests against the State's significant interest in protecting the safety of its police officers.[6]

The Court of Appeals of Maryland wrongly held in this case that the police may not detain a passenger in a lawfully stopped vehicle for safety purposes. (App. 34a). Contrary to the opinion of that court, the balance should tilt in favor of allowing police, on a routine basis, to order passengers to remain in a vehicle stopped for a traffic violation. *Cf. New York v. Class*, 475 U.S. 106, 115 (1986) (recognizing that typical police practice during traffic stops is to keep driver inside car).

Indeed, in the short time since *Wilson* was decided, one federal circuit has held that *Wilson* permits the officer to order a passenger to remain in the car, *United States v. Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997), while a second such court has read *Wilson* as permitting even a greater intrusion than that contemplated by this case, *United States v. Stanfield*, 109 F.3d 976, 981 (4th Cir.

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[6] The present issue is not that which the Court expressly left open in *Wilson*, *i.e.*, whether an officer who orders a passenger out of the car may forcibly detain the passenger for the entire duration of the stop. *Maryland v. Wilson*, 117 S. Ct. at 886 n.3. That question goes to the *scope* of the seizure; the issue presented here goes to the lawfulness of the seizure at its inception.

1997) ("*Mimms* and *Wilson* in particular would support a holding that whenever, during a lawful traffic stop, officers are required to approach a vehicle with windows so heavily tinted that they are unable to view the interior of the stopped vehicle, they may, when it appears in their experienced judgment prudent to do so, open at least one of the vehicle's doors and, without crossing the plane of the vehicle, visually inspect its interior in order to ascertain whether the driver is armed, whether he has access to weapons, or whether there are other occupants of the vehicle who might pose a danger to the officers."); *see also Commonwealth v. Kue*, 692 A.2d 1076, 1080-81 (Pa. 1997) (Newman, J., joined by Castille, J., dissenting) (stating that *Wilson* rationale should allow officer conducting a *Terry* stop to stop detainee's companions as well). To apply *Wilson* to this case represents only a slight, but logical, extension of that case, and one that fully accords with *Wilson*'s undergirding rationale.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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August 14, 1997

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APPENDIX A:

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APPENDIX A

Court of Appeals of Maryland.

No. 18, Sept. Term, 1995.

BRUCE LAMONT DENNIS

v.

STATE OF MARYLAND.

May 19, 1997.

Submitted to BELL, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, RAKER and WILNER, JJ.

BELL, Chief Judge.

In *Dennis v. State*, 342 Md. 196, 674 A.2d 928 (1996), we were presented with "the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention." *Id.* at 198, 674 A.2d at 929. We held "that to justify detaining the passenger, the officer must have a reasonable suspicion

that the passenger engaged in criminal behavior and must have intended to conduct further investigation based on that suspicion." *Id.* at 211-12, 674 A.2d at 935. In that regard, we observed:

> In the case sub judice, the record reflects that once the driver stopped the fleeing vehicle, the petitioner got out and began walking away from the scene, disregarding Officer Foskey's command to stop. Officer Foskey could have concluded from that conduct that the petitioner was fleeing the scene. While fleeing from a police officer or disregarding a police officer's command to stop, in and of itself, does not give rise to probable cause or even a reasonable suspicion sufficient to justify the use of force to detain the person fleeing, ... where that person is a passenger in the automobile as the driver attempts to flee from and elude the police, a police officer reasonably and objectively could entertain a suspicion that he was an active and willing participant with the driver in that attempt. In the instant case, however, that suspicion was not what prompted the officer to detain the petitioner. It was solely because the officer felt he would be safer if the petitioner were detained.

Id. at 210, 674 A.2d at 935 (citing *Watkins v. State*, 288 Md. 597, 604, 420 A.2d 270, 274 (1980)).

We made clear, however, that

> [t]he prosecutor, rather than the officer, articulating a reasonable suspicion, justified by the record, on which the officer may have acted, may not be sufficient for a *Terry [v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] stop. It clearly is not sufficient in the instant case, where a stop for the officers' safety, rather than a *Terry* investigative stop, was intended. There is

> no articulated reason why the officers would be safer by detaining the petitioner, rather than simply allowing him to walk away from the scene.

Id. at 211, 674 A.2d at 935. Moreover, we also pointed out that "we [were] not holding ... that a passenger in an automobile whose driver has fled from and eluded the police has an unfettered right to ignore a police officer's commands to stop." *Id.* at 211-12, 674 A.2d at 935.

The State of Maryland filed a petition for a writ of certiorari, asking the United States Supreme Court to review this Court's judgment. That Court granted the State's petition, vacated this Court's judgment, and remanded the case to this Court for further consideration in light of *Whren v. United States*, 517 U.S. ____, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). *Maryland v. Dennis*, 517 U.S. ____, 117 S.Ct. 40, 136 L.Ed.2d 4 (1996).

In *Whren*, the issue, as articulated by Justice Scalia, who authored the opinion for a unanimous Court, was "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id.* at ____, 116 S.Ct. at 1772, 135 L.Ed.2d at 94. In that case, accepting that there was probable cause to make the traffic stop, the petitioners argued, instead, that, " 'in the unique context of civil traffic regulations' probable cause is not enough." *Id.* at ____, 116 S.Ct. at 1773, 135 L.Ed.2d at 96. Their concerns, as interpreted by the Court, were:

> Since ... the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will

> almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.

Id. at ___, 116 S.Ct. at 1773, 135 L.Ed.2d at 96. Stated differently, the petitioners' focus was on determining what the arresting officer may have been thinking but did not articulate, rather than on what he or she, in fact, did articulate. The solution proposed by the petitioners was to substitute for the established Fourth Amendment test of whether there was probable cause for the stop, a new test of "whether a police officer, acting reasonably, would have made the stop for the reason given." *Id.* at ___, 116 S.Ct. at 1773, 135 L.Ed.2d at 96.

The Court recognized that the petitioners' proposed test was motivated by their concern that the police action not be a pretext. Rejecting the petitioners' argument and proposed test, the Court pointed out that its cases[1] "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.* at ___, 116 S.Ct. at 1774, 135 L.Ed.2d at 98. *See also Ohio v. Robinette*, 519 U.S. ___, 117 S.Ct. 417, 136 L.Ed.2d 347

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[1] The cases to which the Court referred were: *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n. 3, 103 S.Ct. 2573, 2577, 584, n. 3, 77 L.Ed.2d 22, 28, n. 3 (1983); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Gustafson v. Florida*, 414 U.S. 260, 266, 94 S.Ct. 488, 492, 38 L.Ed.2d 456, 461 (1973); *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168, 178 (1978).

(1996). Moreover, the Court expressed concern over the fact that such a test "is plainly and indisputably driven by subjective considerations," *id.* at ____, 116 S.Ct. at 1774, 135 L.Ed.2d at 98, and asks more of the Court than would be the case had the focus been confined to the actions of the individual officer. *Id.* As the Court put it:

> [I]t seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.

Id. at ___, 116 S.Ct. at 1775, 135 L.Ed.2d at 99.

The issue in this case is different from the issue presented and resolved by the Court in *Whren*, and, thus, *Whren* is not dispositive. In the instant case, what Dennis challenged was his detention without probable cause when the police did not wish to make an investigative stop but, instead, stated they wished to detain him "for the officer's safety." It is noteworthy that subsequent to its decision in *Whren*, the Supreme Court indicated that the question resolved in the instant case, whether "an officer may forcibly detain a passenger for the entire duration of [a traffic] stop," remains open. *Maryland v. Wilson*, 519 U.S. ____, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). In *Wilson*, the Supreme Court held that a police officer may order passengers to get out of a car during a traffic stop. The Court noted, however, that it was expressing no opinion on the validity of the forcible detention of

passengers. *Id.* at ___, n. 3, 117 S.Ct. at 886, n. 3, 137 L.Ed.2d at 48, n. 3. The issue decided in the instant case was not addressed by the Supreme Court in *Whren*, and was left expressly undecided in *Wilson*.

What we clearly concluded in the instant case is that there was no reason articulated or indicated as to why it was necessary to detain Dennis "for the officer's safety," and the detention could not be justified on any other basis. First, there was no probable cause to arrest Dennis. Second, although the officer might have had a reasonable suspicion adequate to make an investigative stop pursuant to *Terry v. Ohio*, the officer did not intend to question Dennis, and a *Terry* investigative stop was not the basis for Dennis's detention. Without some explanation, we were unable to determine why it was safer for the officer to detain Dennis rather than allow him to walk away from the scene. Our holding resulted from the officer's indication that he did not make an investigative stop and was not motivated by any suspicion that Dennis was involved in illegal activity. We recognized that the officer might have had a basis for a *Terry* stop, but noted that the officer's stop was made only because of his unexplained belief that detaining Dennis was safer for the officer than letting Dennis leave the scene. There was no intent to interrogate Dennis as might have been permitted by *Terry* and no indication why Dennis should be stopped for the officer's safety. This analysis is perfectly consistent with the *Whren* analysis.

Having reconsidered this case in light of the principles enunciated in *Whren* and finding them inapposite, we reaffirm our prior holding and opinion.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY SOMERSET COUNTY.

RAKER, Judge, dissenting.

The United States Supreme Court vacated the judgment in this case and remanded it to this Court for further consideration in light of *Whren v. United States*, 517 U.S. ____, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Upon reconsideration, the majority reasons that our analysis in *Dennis v. State*, 342 Md. 196, 674 A.2d 928 (1996) (*Dennis I*), is "perfectly consistent with the *Whren* analysis." Maj. op. at 1152. The majority concludes: "Having reconsidered this case in light of the principles enunciated in *Whren* and finding them inapposite, we reaffirm our prior holding and opinion." Maj. op. at 1152. I respectfully dissent.

I believe that our approach in *Dennis I* is inconsistent with the rationale underpinning *Whren* and, in my view, is the reason the Supreme Court directed this Court to reconsider the case. The analysis applied by this Court in *Dennis I* is not the objective assessment contemplated by *Whren*. I believe that, consistent with the direction of the Supreme Court to reconsider this case in light of *Whren*, this case should be set in for reargument, with the parties directed to brief and argue two issues: (1) whether the legality of a *Terry* stop is to be assessed by the objective facts known to the investigating officers rather than the

justification articulated by them; and (2) if the test is an objective one, whether the stop was lawful under the circumstances.

In *Whren*, the Supreme Court held that the constitutional reasonableness of a traffic stop does not depend on the actual motivation of the individual police officer involved, but instead depends upon whether the circumstances, viewed objectively, justify the action. *See Whren*, 517 U.S. at ____, 116 S.Ct. at 1774, 135 L.Ed.2d at 98. The Court stated that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at ____, 116 S.Ct. at 1775, 135 L.Ed.2d at 98 (emphasis in original).

In *Dennis I*, this Court applied a subjective test rather than an objective test to determine whether the officer's conduct was justified. We recognized that Officer Foskey could have concluded from Dennis' conduct that he was fleeing the scene, that Dennis was an important witness to an incarcerable traffic incident that had just transpired, or that there may well have been sufficient evidence in the record from which the officer could have possessed a reasonable, articulable suspicion that Dennis aided and abetted the driver. Nonetheless, the Court determined that the stop was unlawful because the officer failed to *articulate* that he intended the stop to be on any of those specific bases. Furthermore, this Court stated: "Indeed, such an articulation is a condition precedent to a judicial determination that a reasonable suspicion justified the officer's conduct." *Dennis*, 342 Md. at 209, 674 A.2d at 934. We reasoned that "[i]nasmuch as [Officer Foskey] did not, as the State recognized, articulate the requisite reasonable suspicion *Terry* requires, it is clear that Officer

Foskey did not contemplate an investigatory stop with the petitioner as its object." *Id.* at 208, 674 A.2d at 934. The Court further concluded that even though the prosecutor articulated a reasonable suspicion on which the officer may have acted, and that suspicion was justified by the record, the *Terry* stop was invalid because no *Terry* investigative stop was intended. *Id.* at 211, 674 A.2d at 935. In conflict with this holding, the Court stated: "We need not, however, decide in the instant case, whether the officer must articulate specifically the basis for the stop in order to permit the court to conclude that a *Terry* stop was justified."[1] *Id.* at 210, 674 A.2d at 935.

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[1] In the State's Petition for Writ of Certiorari in the Supreme Court of the United States, the State urged:

> Regardless of the disposition in *Maryland v. Wilson*, this Court should grant the instant petition and vacate and remand the case in light of this Court's recent decision in *Whren v. United States*, 517 U.S. ____, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In *Whren*, this Court held that the constitutional reasonableness of traffic stops is dependent not on the actual motivations or subjective intentions of the officers involved but, rather, on whether the "circumstances, viewed objectively, justify that action." *Id.* at ____, 116 S.Ct. at 1774. This Court stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis ... the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.*
>
> The decision of the Court of Appeals of Maryland directly contravenes this principle insofar as the court deemed determinative not the objective circumstances of the stop but the subjective intention of the police officer effectuating

The Supreme Court has not directly addressed the issue of whether the legality of a *Terry* stop is to be assessed by the objective facts known to the investigating officers rather than the justification articulated by them. In fact, the State argued in its Motion for Reconsideration of *Dennis I*, filed April 10, 1996, that the officer need not articulate suspicions of criminality on the passenger's part, but rather that "the record need only demonstrate that a reasonable officer in the stopping officer's situation would have been suspicious." The State urged that this Court reconsider its opinion (*Dennis I*) to hold that *Terry* does not require an officer subjectively to harbor, and to articulate, a reasonable suspicion of criminality before engaging in a *Terry* stop, and that the record supports the Terry stop that occurred in this case.[2]

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the stop. (App. 14a-15a). The court held: "It is not enough that the record contains facts on the basis of which a police officer could entertain a reasonable, articulable suspicion sufficient to justify an investigatory stop, however. *Terry* requires more. The police officer must intend the stop to be an investigative stop, not a detention for safety purposes." (App. 15a). The decision of the Court of Appeals of Maryland in this regard, therefore, should be reversed in accordance with *Whren*.

Dennis v. Maryland, 342 Md. 196, 674 A.2d 928 (1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 18, 1996) (No. 96-112).

[2] I do not address the separate question of whether the police may order passengers to remain in the car for a reasonable period of time while they conduct their investigation, a question left open and undecided by the Supreme Court in *Maryland v.*

Courts that have considered this issue are not unanimous in their resolution of this question, although the majority view seems to support the argument of the State. *See, e.g.*, 1 LAFAVE, SEARCH & SEIZURE, § 1.4(d) & n.82 (3d ed. 1996). For example, in *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987), the Third Circuit rejected Hawkins' argument that because the officers testified that their sole reason for investigating the car was the alleged traffic violation, and that because the trial court did not believe this testimony, the stop was unlawful.[3]

Wilson, ___ U.S. ____, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

[3] In *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987), the Third Circuit rejected a distinction between arrest cases and investigatory stops, and responded to the contrary view expressed in the dissent:

> The dissent suggests that while an objective standard may be appropriate for arrest cases, where the issue is probable cause, only a subjective standard is appropriate for investigatory stops, which are judged under a reasonable suspicion inquiry. We do not find this distinction persuasive. The probable cause and reasonable suspicion tests are similar in that they both look to the incriminating facts known to the seizing officer to determine the validity of a "seizure" under the Fourth Amendment. *See Terry*, 392 U.S. at 16-20, 88 S.Ct. at 1877-79. Thus, in *United States v. Hensley*, 469 U.S. [221] at 230-33, 105 S.Ct. [675] at 681-83, [83 L.Ed.2d 604 (1985)], an investigatory stop case, the Supreme Court relied interchangeably on arrest and stop cases.

Id. at 215 n.5.

This approach of analyzing probable cause and reasonable suspicion in a similar fashion is supported by the recent

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Supreme Court decision of *Ornelas v. United States*, ___ U.S. ____, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). In that case, the Supreme Court granted certiorari to consider the applicable standard of appellate review of the trial court's determination of both reasonable suspicion and probable cause. *Id.* at ____, 116 S.Ct. at 1661, 134 L.Ed.2d at 918. The Court held that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. *Id.* at ____, 116 S.Ct. at 1663, 134 L.Ed.2d at 920. In this regard, the Court treated the concepts of reasonable suspicion and probable cause alike. The Court defined reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity. *Id.* at ____, 116 S.Ct. at 1661, 134 L.Ed.2d at 918. If the standard of appellate review is *de novo*, a strong argument can be made that it matters not what the officer articulates, so long as the record demonstrates, from the standpoint of an objectively reasonable police officer, reasonable suspicion or probable cause for his or her actions.

It has long been the law in Maryland that the validity of an arrest depends upon whether the officer had probable cause to arrest, not whether the officer articulated the correct basis for the arrest. *See Herod v. State*, 311 Md. 288, 299, 534 A.2d 362, 367 (1987) (holding that reviewing court is not limited to the legal basis for the stop of the auto as articulated by the officer; officer's subjective legal intent is not controlling); *Braxton v. State*, 234 Md. 1, 6, 197 A.2d 841, 844 (1964); *Hamm v. State*, 72 Md.App. 176, 184, 527 A.2d 1326, 1330 (1987). *See also Gadson v. State*, 341 Md. 1, 9-10, 668 A.2d 22, 26-27 (1995); *Watkins v. State*, 288 Md. 597, 606, 420 A.2d 270, 275 (1980). *See generally* 1 LAFAVE, *supra*, § 1.4(d) (reasoning that exclusion based on officer's mistaken grounds for arrest is "unjustified ... because such situations are

The trial court held that the justification articulated by the officers at the suppression hearing was insufficient to justify the *Terry* stop, but denied the motion to suppress because the events that the officers observed provided reasonable suspicion to support the stop. *Hawkins*, 811 F.2d at 212. The Third Circuit affirmed the trial court and held that "the legality of a stop must be judged by the objective facts known to the seizing officers rather than by the justifications articulated by them." *Id.* at 213. The appellate court further concluded that a Fourth Amendment inquiry focuses on the objective facts known to the officer rather than the officer's state of mind, and that an investigatory stop is lawful when the officer has a "particularized and *objective* basis for suspecting [a] particular person stopped of criminal activity." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981)) (emphasis added by Court of Appeals for the Third Circuit).

In *State v. Mitchell*, 80 Wash.App. 143, 906 P.2d 1013 (1995), in response to the appellant's argument that the search was unlawful because the officer did not articulate a reasonable suspicion, the court found that the facts of the case supported a reasonable suspicion of criminal activity. *Id.* 906 P.2d at 1016. The intermediate appellate court held that "the existence of such reasonable suspicion is determined based on an objective view of the known facts, and is not dependent upon the officer's subjective belief or

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often attributable to complicated legal distinctions between offenses or an officer's failure to record all the bases or the strongest basis upon which the arrest was made.").

upon the officer's ability to correctly articulate his or her suspicion in reference to a particular crime." *Id.*

Similarly, in *Marbury v. United States*, 540 A.2d 114 (D.C. 1985), the District of Columbia Court of Appeals held that upon review of the record, the circumstances known to the officer at the time of the stop, viewed objectively, warranted his actions. *Id.* at 115. The Fourth Amendment's prohibition against unreasonable seizures requires only objective reasonableness, and the officer's asserted reason for his actions is not controlling. *Id.* at 115-16.

On the other hand, some courts have adopted the view that "an investigative stop can be justified based on an objectively reasonable suspicion of any offense, provided that the offense for which reasonable suspicion exists is related to the offense articulated by the officer involved." *State v. Bolosan*, 78 Hawai'i 86, 890 P.2d 673, 681 (1995) (based on Article I, § 7 of the Hawaii Constitution); *State v. Hollis*, 161 Vt. 87, 633 A.2d 1362, 1366 (1993); *cf. United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir.1971). Relying specifically on Article I, Section 10 of the Minnesota Constitution, the Minnesota Supreme Court held that in order to justify a stop to investigate for criminal wrongdoing, the officer must be able to articulate at the court hearing that "he or she had a particularized and objective basis for suspecting the seized person of criminal activity." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995).

The strong weight of federal and state authority, however, synthesize the Supreme Court's precedents to conclude that a police officer need not articulate a subjective reasonable belief where the surrounding circumstances of the investigatory stop provide objective

reasonable suspicion. So long as the record indicates that there was a proper legal basis to justify the stop, the officer's subjective motivation or his stated intention does not render the stop unlawful. This Court should review *Dennis I* in light of this standard.

This Court disregards the rationale of *Whren* when it suggests that our opinion in *Dennis I* is perfectly consistent with *Whren*. *Whren* stands for the proposition that in determining the legitimacy of police conduct under the Fourth Amendment, a court must look to objective circumstances, and not the subjective motivations of the police officer. The Supreme Court reiterated in *Whren* a proposition that it established in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973): "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren*, 517 U.S. at ____, 116 S.Ct. at 1774, 135 L.Ed.2d at 98. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id. See also Ohio v. Robinette*, ___ U.S. ____, ____, 117 S.Ct. 417, 420, 136 L.Ed.2d 347, 354 (1996) (stating that "[w]e think that under our recent decision in *Whren v. United States*, 517 U.S. ____, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ... the subjective intentions of the officer did not make the continued detention of respondent illegal under the Fourth Amendment.").

The majority recognizes that the record in this case may very well evidence objective circumstances that would justify the actions of Officer Foskey, but refuses to reconsider the case under an objective test. The majority,

stating "what we clearly concluded in the instant case," rewrites *Dennis I*. The majority says we clearly concluded

> that there was no reason articulated or indicated as to why it was necessary to detain Dennis "for the officer's safety," and the detention could not be justified on any other basis. First, there was no probable cause to arrest Dennis. Second, although the officer might have had a reasonable suspicion adequate to make an investigative stop pursuant to *Terry v. Ohio*, the officer did not intend to question Dennis, and a *Terry* investigative stop was not the basis for Dennis's detention. Without some explanation, we were unable to determine why it was safer for the officer to detain Dennis rather than allow him to walk away from the scene. Our holding resulted from the officer's indication that he did not make an investigative stop and was not motivated by any suspicion that Dennis was involved in illegal activity. We recognized that the officer might have had a basis for a *Terry* stop, but noted that the officer's stop was made only because of his unexplained belief that detaining petitioner was safer for the officer than letting petitioner leave the scene. There was no intent to interrogate Dennis as might have been permitted by *Terry* and no indication why petitioner should be stopped for the officer's safety. This analysis is perfectly consistent with the *Whren* analysis.

Maj. op. at 1152. First, we noted in *Dennis I* that the issue framed by the parties concerns the scope and application of *Terry*. *Dennis*, 342 Md. at 204, 674 A.2d at 932. Second, contrary to the assertion of the majority, this Court never said in *Dennis I* that the detention could not be justified on any other basis. Third, Officer Foskey never testified that he did not intend to question Dennis.

Fourth, Officer Foskey never testified that he was not motivated by any suspicion that Dennis was involved in illegal activity. And finally, Officer Foskey did not testify that the stop was made *only* because of his belief that it was safer to keep Dennis in the car rather that let him leave. A reading of our *Dennis I* opinion leads to the inescapable conclusion that the basis of the Court's opinion was the failure of the officer to articulate "a reasonable suspicion that [Dennis] was engaged in the criminal conduct for the investigation of which the stop was made." *Id.* at 208, 674 A.2d at 934. The Court went on to state: "Inasmuch as he did not, as the State recognized, articulate the requisite reasonable suspicion *Terry* requires, it is clear that Officer Foskey did not contemplate an investigatory stop with the petitioner as its object." *Id.* This conclusion is repeated throughout. *Id.* at 209, 211-12, 674 A.2d at 934-36.

The foundation of the majority's decision is the subjective intention of the officer. This is the very issue the Supreme Court directed that we reconsider.

APPENDIX B

MARYLAND, petitioner,
v.
Bruce Lamont DENNIS.

No. 96-112.

Supreme Court of the United States

Oct. 7, 1996.

Case below, 102 Md. App. 789; 338 Md. 160, 656 A.2d 794; 342 Md. 196, 674 A.2d 928.

On petition for writ of certiorari to the Court of Appeals of Maryland. Motion of respondent for leave to proceed in forma pauperis granted. Petition for writ of certiorari granted. Judgment vacated and case remanded to the Court of Appeals of Maryland for further consideration in light of Whren v. United States, 517 U.S. ____, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996).

APPENDIX C

Bruce Lamont DENNIS

v.

STATE of Maryland.

No. 18, Sept. Term, 1995.

Court of Appeals of Maryland.

March 13, 1996.

Reconsideration Denied May 3, 1996.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

BELL, Justice [sic].

This case presents the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention. The Circuit Court for Somerset County found the petitioner, Bruce Lamont Dennis, guilty of disorderly conduct and battery and sentenced him to two concurrent terms of

imprisonment of 45 days.[1] The Court of Special Appeals affirmed the judgments in an unreported opinion. For the reasons discussed below, we shall reverse.

I.

Officer Wayne Foskey, of the Princess Anne Police Department, testified in the Circuit Court for Somerset County that on November 27, 1993 he saw a vehicle drive through a red traffic signal. Intending to make a traffic stop, Officer Foskey and his partner pursued the vehicle, while flashing the emergency lights on the police car. The driver of the pursued vehicle ignored the lights and increased his speed. Officer Foskey then shined a flashlight into the vehicle and told the driver to pull over. The driver ignored this command as well and again increased his speed. Eventually, the driver pulled the vehicle into a driveway in a residential neighborhood where five or six persons were congregated. At that point, the police, then assisted by a third officer, Trooper Bettina Collins, ended the chase.

Once the vehicle stopped, both the driver and the petitioner attempted to exit the vehicle, according to Trooper Collins's testimony. When the petitioner opened the passenger side door, Officer Foskey "yelled for him to shut the car door and stay in the vehicle." Instead, the

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[1] The petitioner was charged not only with battery and disorderly conduct, but also with obstructing and hindering a police officer, and with resisting arrest. At the close of the State's case, the trial court granted the petitioner's motion for judgment of acquittal as to these counts.

petitioner stepped out of the vehicle. He ignored Officer Foskey's command to get back into the vehicle and began walking away without uttering a word. Officer Foskey yelled for the petitioner to stop, but he continued to walk away.

Trooper Collins testified that while the petitioner and the driver were attempting to exit the vehicle, "[t]here were several subjects in the yard at that time who were also yelling at us and saying things to Dennis and the other subject." Confronted with the petitioner's continued resistance to his commands, Officer Foskey proceeded to "[take the petitioner] to the ground." The petitioner struck Officer Foskey in the ribs with his elbow and began fighting with him. After spraying the petitioner twice with pepper mace, Officer Foskey finally got him back in the car.

The petitioner was tried for, *inter alia*, disorderly conduct and battery.[2] Finding the petitioner guilty, the trial judge stated:

> Gentlemen, considering the totality of the circumstances, the fact that there was a high speed chase, albeit after perhaps running a red light, I think the officer's actions were not unreasonable at all. I think, all Mr. Dennis had to do was stop, stay where he was, let the officer identify him and ensure that there were no problems with the officer's safety, and we wouldn't have been in court. That didn't happen. I think that with the fact that there were other people in the area at that location, according to

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[2] *See supra*, note 1.

> Trooper Collins, who began yelling and shouting at the officers, that by refusing the [sic] comply with the officer's commands to stay within the car, and when he got out of the car, to get down, I think he violated Article 27, Section 123. He was charged with the correct section by refusing the lawful order of a police officer, the refusal of which could have threatened the public peace. Likewise, as to Count #1, I think there was an unlawful touching. I think the officer was justified in doing what he did when he physically restrained Mr. Dennis, the defendant, from leaving the area. It all could have been avoided if Mr. Dennis had complied with the officer's command, which was not unreasonable.
>
> I'm convinced beyond a reasonable doubt that Mr. Dennis is guilty of Count #1, Battery, and Count #2, Disorderly Conduct.

II.

In examining the petitioner's disorderly conduct conviction, we must first consider the nature of the crime itself. Disorderly conduct is addressed in Maryland Code (1957, 1992 Repl. Vol.), Article 27, § 123, and provides, in pertinent part:

> A person may not act in a disorderly manner to the disturbance of the public peace, upon any public street, highway, alley, park or parking lot, in any city, town, or county in this State, or at any place of public worship, or public resort or amusement in any city, town or county in this State, or in any store during business hours, or in

> any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units, or in any public building in any city, town or county of this State.

In *Drews v. State*, 224 Md. 186, 167 A.2d 341 (1961), *vacated on other grounds and remanded*, 378 U.S. 547, 84 S.Ct. 1900, 12 L.Ed.2d 1032 (1964), *judgments reinstated and reaffirmed*, 236 Md. 349, 204 A.2d 64 (1964), *appeal dismissed and cert. denied*, 381 U.S. 421, 85 S.Ct. 1576, 14 L.Ed.2d 693 (1965), this Court stated that

> [t]he gist of the crime of disorderly conduct under Sec. 123 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area. 3 Underhill, *Criminal Evidence*, Sec. 850 (5th Ed.), adopts as one definition of the crime the statement that it is conduct 'of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.' Also, it has been held that failure to obey a policeman's command to move on when not to do so may endanger the public peace, amounts to disorderly conduct.

Id. at 192, 167 A.2d at 343-44. Thus, while not explicitly stated in the statute, this Court has found there to be a "police command" aspect of disorderly conduct. To be guilty of disorderly conduct on this basis, however, there must be a sufficient nexus between the police command and the probability of disorderly conduct. These commands cannot be "'purely arbitrary and ... not calculated in any way to promote the public order.'" *Id.* at

193, 167 A.2d at 344 (quoting *People v. Galpern*, 259 N.Y. 279, 181 N.E. 572, 574 (1932)). *See also Harris v. State*, 237 Md. 299, 303, 206 A.2d 254, 256 (1965) (holding that "[a] failure to obey a reasonable and lawful request by a police officer fairly made to prevent a disturbance to the public peace constitutes disorderly conduct.").

Our prohibition of arbitrary police commands is consistent with the Supreme Court's holding in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). In that case, the Court struck down a city ordinance that made it "'unlawful for any person to stand or loiter upon any street or sidewalk ... after having been requested by any police officer to move on.'" *Id.* at 90, 86 S.Ct. at 213, 15 L.Ed.2d at 179 (quoting § 1142 of the Birmingham General City Code). The Court stated that citizens should not be governed "'by the moment-to-moment opinions of a policeman on his beat[,]'" but rather by clearly defined laws. *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579, 85 S.Ct. 466, 469, 13 L.Ed.2d 487, 501 (1965)). The Court further stated that law based on "[i]nstinct with its ever-present potential for arbitrarily suppressing First Amendment liberties ... bears the hallmark of a police state." *Id.* at 90-91, 86 S.Ct. at 213, 15 L.Ed.2d at 179 (footnote omitted).

A brief review of some of the instances in which Art. 27, § 123 violations premised on the refusal to comply with police commands have been found are instructive, by way of comparison with the case *sub judice*, to show that Maryland case law demands more affirmative conduct by a defendant than occurred in this case before disobeying a police order will be deemed a breach of the peace. For example, in *Hallengren v. State*, 14 Md.App. 43, 286 A.2d

213 (1972), the defendant was among a crowd of people engaged in riotous behavior. While the police attempted to disperse the crowd, the defendant exhorted the crowd "to resist and kill the police." *Id.* [at] 45-46, 286 A.2d at 215. In *Luthardt v. State*, 6 Md.App. 251, 251 A.2d 40 (1969), the defendant encouraged a crowd to burn down the home of an African American family. The police ordered the defendant to desist from his conduct and when he failed to do so he was arrested. *Id.* at 253-55, 251 A.2d at 42-43. In *Bacheller v. State*, 3 Md.App. 626, 240 A.2d 623 (1968), *rev'd on other grounds*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970), the defendants, Vietnam War demonstrators, entered a United States recruiting station and demanded that their anti-war posters be displayed. After being physically ejected from the building, they began blocking the sidewalk, attracting a crowd of onlookers, including some individuals who reacted in a hostile manner to the demonstrators. The demonstrators were ordered by the police to move on and after failing to do so were arrested. *Id.* at 630-31, 240 A.2d at 625-26. *See also Sharpe v. State*, 231 Md. 401, 403, 190 A.2d 628, 630-31, *cert. denied*, 375 U.S. 946, 84 S.Ct. 350, 11 L.Ed.2d 275 (1963).

In addressing the disorderly conduct conviction, the State contends that the refusal of the petitioner to stay in the vehicle once it was stopped, coupled with the refusal to comply with Officer Foskey's subsequent commands, constituted disorderly conduct. The State argues, in that regard, that "*Drews* and *Harris* instruct that a conviction for disorderly conduct will lie whenever a person disobeys a lawful police command to stay -- or go -- when such a command is designed to avoid a breach of the peace." That argument proves unavailing in the instant case

because the testimony lacks the evidentiary foundation on which to base the petitioner's conviction. As noted earlier, Trooper Collins testified that the persons gathered in the yard where the driver's vehicle was stopped were yelling at the police and saying things to the driver and the petitioner. We find it highly significant, however, that the State has proffered no evidence as to the genesis of the yelling, what was being said, even whether the persons were reacting in favor of the petitioner or the police.

In sum, the circumstances described by the State in no way lend themselves to the notion that the petitioner's conduct created any real danger of a breach of the peace. As we see it, the quantum of evidence necessary to sustain a disorderly conduct conviction under Art. 27 § 123 is much greater than the State offered, or suggests, in this case.

III.

A.

As part of its effort to justify Officer Foskey's actions in seizing the petitioner, the State cites *Barnhard v. State*, 325 Md. 602, 602 A.2d 701 (1992), for the proposition that "'[w]here a crime may have been committed and a *suspect* or *important witness* is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken.'" *Id.* at 615, 602 A.2d at 708 (quoting *Watkins v. State*, 288 Md. 597, 605, 420 A.2d 270 (1980) (quoting, in turn, ALI, A Model Code of Pre-Arraignment Procedure § 110.2 (Commentary 1975)))

(emphasis added). *Barnhard*, however, may be distinguished from the instant case. In *Barnhard*, police officers testified that, when responding to a stabbing incident, they encountered the defendant who volunteered to show the police where the knife used in the stabbing had been discarded. 325 Md. at 605, 602 A.2d at 703. On that basis, they considered the defendant to be a "material witness," and, thus, sought to detain him. *Id.* at 605-06, 602 A.2d at 703.

In the instant case, by contrast, there is neither testimony nor evidence in the record indicating that the police considered the petitioner either an "important witness" to the criminal conduct of the driver or a suspect in the case. In fact, as will be discussed *infra*, the basis for the petitioner's detention had nothing to do with either such status. Therefore, the record does not reveal that it was necessary to "freeze" the situation.

B.

The State concedes the petitioner's right to resist an unlawful arrest in this case; however, it argues that Officer Foskey was effectuating a stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Accepting the State's premise equating "lawfulness" with a stop that does not violate the Fourth Amendment under *Terry*, the petitioner counters that his seizure violated *Terry*. Thus, the issue framed by the parties concerns the scope and application of *Terry*.

To be sure, Officer Foskey's tackling of the petitioner amounted to a "seizure." *See Terry*[,] 392 U.S. at 16, 88 S.Ct. at 1877, 20 L.Ed.2d at 903 ("It must be recognized that whenever a police officer accosts an individual and

restrains his freedom to walk away, he has 'seized' that person."). The question in this case then becomes whether the seizure was legal. Our analysis in this area is guided by the contours of the Fourth Amendment. Under *Terry*, it is permissible for a police officer to "stop" a person briefly if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The reasonableness of such an intrusion, however, "is to be assessed against an objective standard -- whether 'the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate.'" *Anderson v. State*, 282 Md. 701, 705, 387 A.2d 281, 283 (1978) (quoting *Terry*, 392 U.S. at 21-22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906).

A *Terry* stop is an investigatory stop. It is justified on the basis of the general interest in "effective crime prevention and detection." *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. The rationale underlying a *Terry* stop is that, when the circumstances are appropriate, a police officer may stop a person "for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 907. Whether appropriate circumstances exist depend[s] upon "the facts and circumstances ... detailed before the trial judge ..." and whether a reasonably prudent person would have concluded that, under those circumstances, a detention for further investigation was justified. *Id.* at 28, 88 S.Ct. at 1883, 20 L.Ed.2d at 910. Because the purpose of the stop is investigatory and must be justified by the facts and circumstances detailed to the court, it follows that the police officer must intend that the stop be investigatory and the stop, in fact, must be for that purpose.

In a traffic situation, the police officer's recitation of the facts leading up to the stop of an automobile ordinarily will suffice to supply probable cause for arrest, in the case of an offense for which arrest is appropriate, or for a stop in the case of other offenses. This circumstance is so because it is the action of the driver of the automobile that is at issue. The presence of a passenger in the car does not change the analysis. The actions of the driver are not automatically, or even necessarily, attributable to the passenger, however. Whether the passenger is subject to arrest or stop will depend upon the facts and circumstances as they relate to the passenger. Thus, as in this case, the officers' articulation of the circumstances surrounding the stop of the automobile revealed that they had probable cause to arrest the driver for fleeing and eluding. In the absence of additional information focusing on the passenger's actions, that articulation did not provide probable cause to believe that his passenger was also engaged in that fleeing and eluding. The question, therefore, is whether there was a basis to further investigate the passenger's involvement in the criminal act for which the driver was being arrested. The answer to that question depends upon whether there was an articulable basis for believing that the passenger was somehow involved, other than as a passenger, in the commission of that crime.

There ordinarily is no reason to believe that a passenger in a vehicle is guilty, as an accessory or aider and abettor, of the traffic offense with which the driver may be charged. This is true even when the offense is fleeing and eluding. *See e.g. Tasco v. State*, 223 Md. 503, 509, 165 A.2d 456, 459 (1960), *cert. denied*, 365 U.S. 885, 81 S.Ct. 1036, 6 L.Ed.2d 195 (1961); *Judy v. State*, 218 Md. 168,

176, 146 A.2d 29, 33 (1958). It is only when the passenger's actions are consistent with those of an accessory or aider and abettor that a police officer has a basis for focusing on and/or charging the passenger. When, for example, the passenger in an automobile in which the driver is charged with fleeing from the police, flees after the automobile is stopped, it is possible for there to arise at least a reasonable suspicion that the passenger was the driver's accessory or aider and abettor.[3]

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[3] Maryland Code (1977, 1992 Repl.Vol., 1994 Cum.Supp.), § 21-904 of the Transportation Article provides, in pertinent part:

> (b) *Failing to stop vehicle*. -- If a police officer gives a visual or audible signal to stop and the police officer is in uniform, prominently displaying the police officer's badge or other insignia of office, a driver of a vehicle may not attempt to elude the police officer by willfully failing to stop the driver's vehicle.
>
> (c) *Fleeing on foot*. -- If a police officer gives a visual or audible signal to stop and the police officer is in uniform, prominently displaying the police officer's badge or other insignia of office, a driver may not attempt to elude the police officer by fleeing on foot.

By its terms, this section is addressed only to drivers. Section 26-101, however, provides, as relevant:

> (a) *Persons committing violations*. -- Any person who commits a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.
>
> (b) *Persons attempting to commit violations*. -- Any person who attempts to commit a violation

(continued...)

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[3](...continued)

of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.

(c) *Persons conspiring to commit violations*. -- Any person who conspires to commit a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.

(d) *Persons aiding others in commission of violations*. -- Any person who aids another in the commission of a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.

(e) *Persons abetting others in commission of violations*. -- Any person who abets another in the commission of a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.

(f) *Persons inducing others to commit violations*. -- Any person who intentionally induces another to commit a violation of the Maryland Vehicle Law is guilty of the violation.

(g) *Persons causing others to commit violations*. -- Any person who intentionally causes another to commit a violation of the Maryland Vehicle Law is guilty of the violation.

(h) *Persons coercing others to commit violations*. -- Any person who intentionally coerces another to commit a violation of the Maryland Vehicle Law is guilty of the violation.

(i) *Persons permitting others to commit*

(continued...)

See Price v. State, 227 Md. 28, 33, 175 A.2d 11, 13 (1961); *Tasco*, 223 Md. at 509, 165 A.2d at 459. In that circumstance, the passenger's flight provides a basis for a *Terry* stop to determine the reason for the flight,[4] *i.e.*, whether he or she, in fact, aided or abetted the driver.

Walking away from an automobile, even one stopped by the police, is not usually considered to be flight unless the person walking away does so in a manner indicative of flight. In some circumstances, however, it may be considered flight, albeit a slow flight, *see Burks v. State*, 96 Md.App. 173, 186, 624 A.2d 1257, 1264 (1993) (flight has no speed requirement). Where a person walks away in defiance of a police officer's request to stop, persistence in walking away may be considered flight.

A *Terry* stop was not what Officer Foskey intended. During his direct examination, the prosecutor asked

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[3](...continued)

> *violations*. -- Any person who intentionally permits another to commit a violation of the Maryland Vehicle Law is guilty of the violation.
> (j) *Persons directing others to commit violations*. -- Any person who intentionally directs another to commit a violation of the Maryland Vehicle Law is guilty of the violation.

Read together, it is clear that § 21-904 also applies, *inter alia*, to passengers who act as aiders and abetters.

[4] The trial judge acquitted the petitioner of resisting arrest, but apparently found that a *Terry* stop was justified when he stated:

> I think the officer was justified in doing what he did when he physically restrained Mr. Dennis, the defendant, from leaving the area.

Officer Foskey why he ordered the petitioner, who had begun to exit, to remain in the vehicle, to which Officer Foskey responded,

> [w]ell, we're taught for officers' safety to keep all subjects in the vehicle. Also, we did not know, the way the subject was acting, we did not know if he had contraband, if he had weapons.... [A]nd for our safety, we always ask all subjects to stay in the vehicle.

These statements are the extent of Officer's [sic] Foskey's testimony as to why he acted as he did toward the petitioner. The State acknowledges that this testimony is Officer's [sic] Foskey's explanation of his behavior.[5] It does not contend, as required by *Terry*, that the testimony articulated a reasonable suspicion that the petitioner was engaged in the criminal conduct for the investigation of

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[5] In its brief, the State observed:

> Both the driver and Dennis tried to get out of the car, and both were ordered to stay seated in the car.... Officer Foskey explained that this is done (and was done in this case) for safety's sake. Foskey said: "[W]e're taught for officers' safety to keep all subjects in the vehicle. Also, we did not know, the way the subject was acting, we did not know if he had contraband, if he had weapons..." This is not an unreasonable, or atypical, precaution. *See New York v. Class*, 475 U.S. 106, 115 [106 S.Ct. 960, 966-67, 89 L.Ed.2d 81] (1986) (commenting that "[k]eeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice.").

which the stop was made. Thus, Officer Foskey detained the petitioner, rather than let him leave the scene, "for officers' safety." Inasmuch as he did not, as the State recognized, articulate the requisite reasonable suspicion *Terry* requires,[6] it is clear that Officer Foskey did not contemplate an investigatory stop with the petitioner as its object.

C.

In the instant case, there may well have been sufficient evidence in the record from which Officer Foskey could have possessed a reasonable, articulable suspicion that the petitioner aided and abetted the criminality of the driver. Had he, in fact, intended to make a *Terry* stop, a different result might be appropriate. It is not enough that the record contain facts on the basis of which a police officer could entertain a reasonable, articulable suspicion sufficient to justify an investigatory stop, however. *Terry* requires more. The police officer must intend the stop to be an investigative stop, not just a detention for safety purposes.

Terry requires that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906 (footnote omitted). Indeed, such an articulation is a condition precedent to a judicial

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[6] As discussed *supra*, Trooper Bettina Collins also testified in the trial court. She, too, failed to articulate a reasonable suspicion for a *Terry* stop based on the petitioner's conduct.

determination that a reasonable suspicion justified the officer's conduct. *Cf. Graham v. State*, 325 Md. 398, 404, 601 A.2d 131, 134 (1992) (stating that "a detention short of arrest is lawful if the police have a reasonable, articulable suspicion for such action."). There is some indication in case law that the officer must *specifically articulate* reasonable suspicion for a *Terry* stop, and in the absence of a specific articulation by the officer, the court is not justified in reaching a conclusion that the surrounding circumstances justified a reasonable suspicion for a *Terry* stop. *Jones v. State*, 319 Md. 279, 287, 572 A.2d 169, 173 (1990) ("[P]olice officers are entitled to make a forcible stop if the officer has reasonable grounds for doing so. He must be able to point to specific and articulable facts that warrant such an intrusion to be within the legal parameters of the Fourth Amendment."); *State v. Wilson*, 106 Md.App. 24, 29, 664 A.2d 1, 3 (1995)[*rev'd* 117 S. Ct. 882 (1997)] ("It is ... the officer who must do the articulating, not the Attorney General by way of appellate afterthought."); *Gibbs v. State*, 18 Md.App. 230, 238, 306 A.2d 587, 592 (1973) ("It is ... clear that the policeman must be able to articulate specific facts justifying both the 'stop' and, quite independently, the 'frisk.'"). *See also State v. Jamison*, 482 N.W.2d 409, 413 (Iowa 1992); *State v. Cripps*, 533 N.W.2d 388, 391-92 (Minn. 1995). Of course, the stated reason for the stop must be objectively reasonable. *See Doctor v. State*, 596 So.2d 442, 447 (Fla.1992 [sic]).

Other courts have rejected the stated reason for the stop of a suspect and, yet, upheld the stop as objectively reasonable. *United States v. Cardona-Rivera*, 904 F.2d 1149, 1153-54 (7th Cir.1990 [sic]); *United States v. Hawkins*, 811 F.2d 210, 214-15 (3rd Cir.1987 [sic]); *State*

v. Mitchell, 80 Wash.App. [sic] 143, 906 P.2d 1013, 1016 (1995). *See State v. Bolosan*, 78 Hawai'i [sic] 86, 890 P.2d 673, 683 (1995). In each case, the officers testified to the facts that the court determined to be controlling and, in each case, those facts related to the subject being stopped. In this case, the observations and testimony concerning the events leading up to the stop all focused on the actions of the driver of the automobile; this testimony in no way detailed what the petitioner did to warrant his detention. We need not, however, decide in the instant case, whether the officer must articulate specifically the basis for the stop in order to permit the court to conclude that a *Terry* stop was justified.

In the case *sub judice*, the record reflects that once the driver stopped the fleeing vehicle, the petitioner got out and began walking away from the scene, disregarding Officer Foskey's command to stop. Officer Foskey could have concluded from that conduct that the petitioner was fleeing the scene. While fleeing from a police officer or disregarding a police officer's command to stop, in and of itself, does not give rise to probable cause or even a reasonable suspicion sufficient to justify the use of force to detain the person fleeing, *see Watkins v. State*, 288 Md. 597, 604, 420 A.2d 270, 274 (1980), where that person is a passenger in the automobile as the driver attempts to flee from and elude the police, a police officer reasonably and objectively could entertain a suspicion that he was an active and willing participant with the driver in that attempt. In the instant case, however, that suspicion was not what prompted the officer to detain the petitioner. It was solely because the officer felt he would be safer if the petitioner were detained.

In the trial court, the prosecutor argued:

> Your Honor, I think Officer Foskey had an absolute right to stop this man and ask him to at least identify himself, and then make a decision at that point in time.
>
> You've got two people who run through a red light, which is not a major crime. It happens every day. I'm sure very few people get stopped for it. But following that you've got a police car that gets behind the vehicle, attempts to stop it, his emergency lights go out but he stayed with the car. A second police car with emergency lights comes behind it .... It's got two police vehicles trying to stop it. It's obvious to everybody, if you believe the officers' testimony, that they're trying to stop the car to the point they even shine a flashlight in the car to get it stopped. The car stops in somebody's yard and both people bail out.
>
> I think there's all kinds of reasons for suspicion in the officer's mind. He's got to do something. He's got to at least identify the two people in the vehicle. He's got to run that car to see whether or not it's stolen, and to see what the reason is for the flight. He's got all kinds of suspicions in his mind....

In so doing, the prosecutor, perhaps to compensate for Officer Foskey's failure to do so, articulated a basis on which Officer Foskey *could have* entertained a suspicion. The prosecution's articulation of a reasonable suspicion, however, is unavailing because no *Terry* investigative stop was intended. The prosecutor, rather than the officer, articulating a reasonable suspicion, justified by the record, on which the officer may have acted, may not be sufficient

for a *Terry* stop. It clearly is not sufficient in the instant case, where a stop for the officers' safety, rather than a *Terry* investigative stop, was intended. There is no articulated reason why the officers would be safer by detaining the petitioner, rather than simply allowing him to walk away from the scene.

So that our position is clear, we are not holding today that a passenger in an automobile whose driver has fled from and eluded the police has an unfettered right to ignore a police officer's commands to stop. We simply hold that to justify detaining the passenger, the officer must have a reasonable suspicion that the passenger engaged in criminal behavior and must have intended to conduct further investigation based on that suspicion.

IV.

Based on the foregoing analysis, we must also dismiss the battery conviction. Because Officer Foskey did not make a *Terry* stop, he is not entitled to the presumption that the stop was legal. It follows, therefore, that Officer Foskey's forcible detention of the petitioner amounted to an arrest and was illegal.[7] This Court has upheld the right

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[7] The State quite correctly points out that the use of force is permissible, if necessary, to effectuate a *Terry* stop. *See, e.g., Lee v. State*, 311 Md. 642, 667, 537 A.2d 235, 247 (1988) (holding that a "brief, though forceful, detention of petitioners was constitutionally justified by reasonable suspicion under the circumstances."); *Terry v. Ohio*, 392 U.S. 1, 7, 88 S.Ct. 1868, 1872, 20 L.Ed.2d 889, 897 (1968) (stating that "Officer McFadden grabbed petitioner Terry, spun him around so that

(continued...)

of a person to resist an unlawful arrest. *See Barnhard v. State*, 325 Md. 602, 614, 602 A.2d 701, 707 (1992); *Rodgers v. State*, 280 Md. 406, 410, 373 A.2d 944, 946, *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977); *Williams v. State*, 204 Md. 55, 64, 102 A.2d 714, 718 (1954); *Sugarman v. State*, 173 Md. 52, 57, 195 A. 324, 326 (1937). Resistance includes the right to use "any reasonable means, including force, to effect [an] escape." *Barnhard*, 325 Md. at 614, 602 A.2d at 707. Thus, we hold that the petitioner is not guilty of the battery of Officer Foskey.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY SOMERSET COUNTY.

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[7](...continued)
they were facing the other two....").

APPENDIX D

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 387

September Term, 1994

BRUCE LAMONT DENNIS

v.

STATE OF MARYLAND

Bloom,
Wenner,
Davis,

JJ.

Per Curiam

Filed: December 9, 1994

Argued before BLOOM, WENNER and DAVIS, JJ.

Appellant, Bruce Lamont Dennis, was convicted at a bench trial in the Circuit Court for Somerset County of battery and disorderly conduct. Sentenced to two concurrent terms of 45 days, he brought this appeal, in which he asks:

I. Was the evidence sufficient to sustain the conviction for disorderly conduct?

II. Did the trial court erroneously convict Appellant of battery?

Finding no error, we shall affirm the judgments of the circuit court.

FACTS

On 27 November 1993, a police officer observed a car in which appellant was a passenger run a red light. After the driver ignored the officer's emergency lights and order to pull over, the car accelerated and a high-speed chase ensued. The car eventually stopped in a private driveway.

Ignoring the officer's order to remain in the car, appellant got out of the car. Appellant then began walking away. When the officer attempted to restrain him, appellant struggled with the officer, and struck him several times before the officer subdued him.

Although appellant was convicted of battery and disorderly conduct, he was acquitted of obstructing and hindering and resisting arrest.

DISCUSSION

In reviewing the sufficiency of the evidence, we must

determine

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Webber v. State, 320 Md. 238, 248, 577 A.2d 58 (1990) (citations omitted).

I.

In Maryland, it is clear that a conviction for disorderly conduct must be supported by evidence that an accused refused to obey an officer, if the refusal may endanger the public peace. *Briggs v. State*, 90 Md.App. 60, 69-70, 599 A.2d 1221 (1992). In the case at hand, the State presented evidence that appellant had failed to obey an officer's order to remain in [appellant's] automobile following a high speed chase. Moreover, appellant's disobedience tended to incite a crowd that had gathered and had begun to exhibit hostility to the officer. There was no error.

II.

Appellant also contends that the officer had attacked him when he was "simply walking away in plain view . . . . " Appellant seems to overlook the fact that ignoring the officer's reasonable request to remain in the car posed a threat to the public. Thus, the officer was justified in using such force as was reasonably necessary to subdue appellant. Again, there was no error.

III.

Appellant finally contends that his conviction for battery was inconsistent with his acquittal of resisting arrest. Upon carefully reviewing the transcript, we conclude that appellant was acquitted of resisting arrest because the trial judge was not certain that appellant had been arrested.[1]

According to *Barnhard v. State*, 325 Md. 602, 611, 602 A.2d 701 (1992), "[a]n arrest is effected (1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits." The evidence adduced at trial indicated that appellant was not arrested until after the battery had occurred, when the officer succeeded in restraining him. *State v. Huebner*, 305 Md. 601, 608 (1986). The acquittal on the charge of resisting arrest appears to have been based on the trial court's erroneous belief that one cannot be guilty of resisting arrest unless he

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[1] THE COURT: No. As to the Third Count, the motion is granted.

Resisting arrest presents a little bit of a problem because there was no testimony that he ever told him that he was under arrest.

STATE'S ATTORNEY: But I think the actions are there, though.

THE COURT: Well, is it enough?

. . .

STATE'S ATTORNEY: . . . I mean, do I have to tell you that you're under arrest if I have my hands on you and I'm trying to cuff you?

THE COURT: I'm not sure.

was told that he was under arrest. But acquitting appellant of resisting arrest on that ground is not fatally inconsistent with convicting him of battery, because appellant had no right to strike an officer who was lawfully attempting to arrest him.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX E

Trial court's ruling of March 16, 1994 in the Circuit Court for Somerset County, The Honorable Daniel M. Long, *State of Maryland v. Bruce Lamont Dennis*, Criminal Case No. 94-CR-03526

* * *

THE COURT: Gentlemen, considering the totality of the circumstances, the fact that there was a high-speed chase, albeit after perhaps running a red light, I think the officer's actions were not unreasonable at all. I think, all Mr. Dennis had to do was stop, stay where he was, let the officer identify him and ensure that there were no problems with the officer's safety, and we wouldn't have been in court. That didn't happen. I think that with the fact that there were other people in the area at that location, according to Trooper Collins, who began yelling and shouting at the officers, that by refusing the [sic] comply with the officer's commands to stay within the car, and when he got out of the car, to get down, I think he violated Article 27, Section 123. He was charged with the correct section by refusing the lawful order of a police officer, the refusal of which could have threatened the public peace. Likewise, as to Count #1, I think there was an unlawful touching. I think the officer was justified in doing what he did when he physically restrained Mr. Dennis, the defendant, from leaving the area. It all could have been avoided if

Mr. Dennis had complied with the officer's command, which was not unreasonable.

I'm convinced beyond a reasonable doubt that Mr. Dennis is guilty of Count #1, Battery, and Count #2, Disorderly Conduct.

* * *

Supreme Court, U.S.
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NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF MARYLAND,

Petitioner

v.

BRUCE LAMONT DENNIS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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11 pp

QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS FOR DISORDERLY CONDUCT AND BATTERY?

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Respondent, Bruce Lamont Dennis, by counsel, Stephen E. Harris, Public Defender of Maryland, and George E. Burns, Jr., Assistant Public Defender, Office of the Public Defender, respectfully requests that the Court deny the Petition for Writ of Certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Respondent was convicted of disorderly conduct and battery. He was

sentenced to two concurrent terms of imprisonment of forty-five days.[1]

Officer Wayne Foskey of the Princess Anne Police Department testified that on November 27, 1993, he was in a patrol car with another officer (Reid) when he saw a vehicle drive through a stop light. Foskey pursued the vehicle, but the driver of the vehicle ignored Foskey's emergency lights and increased his speed. Foskey shined a flashlight into the car and told the driver to pull over. This command was ignored. During the pursuit, another police car, driven by Trooper Bettina Collins joined the pursuit. Eventually, the vehicle was driven into a driveway and stopped.

Respondent was the passenger and opened the passenger's door of the stopped vehicle. Foskey "yelled at him to shut the car door and stay in the vehicle."

> A. He continued to open the door and stepped out of the vehicle. I again hollered for him to get back in the vehicle and shut the door. He totally ignored me. He shut the door of the vehicle and started walking away, at which time I yelled for him to stop. He still totally ignored me, continued moving away, and at this time, I took him to the ground.
>
> Q. And then what happened?
>
> A. At that time, Mr. Dennis struck me in the ribs with his elbow and began fighting and I ended up spraying him with pepper mace. When I got him to the car, I had to spray him with pepper mace again to get him in the car.

According to Trooper Collins.

> Mr. Dennis and the operator of the vehicle ignored our commands at the time. There were several subjects in the yard

---

[1]Petitioner conceded in its Reply to Brief in Opposition in connection with the original Petition in this case to this Court that the disorderly conduct conviction raises no federal issue and is therefore not before this Court. *Maryland v. Dennis*, No. 96-112, (Reply to Brief in Opposition at 1).

at the time who were also yelling at us and saying things to Dennis and the other subject.

REASONS FOR DENYING CERTIORARI

In *Terry v. Ohio*, 392 U.S. 1 (1968) this Court said,

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Id.* at 21.

This Court has never retreated from this requirement. Indeed the *Terry* Court noted that:

> This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. *Id.* at n. 18.

Nevertheless, as the Court of Appeals recognized, some courts have applied this requirement more loosely than others.

> Other courts have rejected the stated reason for the stop of a suspect and, yet, upheld the stop as objectively reasonable . . .
>
> *In each case, the officers testified to the facts that the court determined to be controlling* and, in each case, those facts related to the subject being stopped. (citations omitted, emphasis added). Petition at 35a-36a.

State v. Mitchell, 906 P.2d 1013 (Wash. App. 1995) is an example of this line of cases. An officer noticed Mitchell on a public street in a residential area at night carrying a semi-automatic handgun which Mitchell tucked into his waistband as the officer passed. The officer stopped Mitchell. Although the officer was unable to identify the provision of the penal code that Mitchell might be violating, the Court

observed that the facts testified to by the officer did give a reasonable basis for a violation of a provision of the penal code. In addition, "Although the officer did not name the particular crime for which he could articulate a reasonable suspicion, his suspicion was based on the very factors which constitute unlawful display of a weapon." *Id.* at 148.

Analogous circumstances were present in *State v. Bolosan*, 890 P.2d 673 (Hawaii 1995).

> "At about 11:20 p.m. that night, Honolulu Police Officer Gerry Asato noticed the car that Bolosan was driving stopped at a red light at an intersection 75 to 100 feet away. He heard the engine revving loudly and saw a plume of heavy exhaust. When the light turned green, Bolosan drove through the intersection toward Officer Asato's position. Bolosan did not screech the tires and did not travel at a high speed. Officer Asato did not notice any other cars near Bolosan's car and, when he testified at the motion to suppress, he could not remember if there had been other people on the street or sidewalk, or in the neighborhood." *Id.* at 674.

The officer thought that this conduct might be a violation of Exhibition of Speed. Although there was not a sufficient factual basis to support that conclusion, the specific facts testified to by the officer gave rise to a reasonable belief that the muffler ordinance was being violated. However, *Bolosan* also highlights one of the problems with such cases. Because the officer had not relied on a belief that the muffler ordinance was being violated, he had not been cross-examined on the issue. Therefore the case was remanded for further proceedings on the issue.

Whatever the merit of cases such as *Mitchell* and *Bolosan*, they are plainly

inapplicable to the facts in the case at bar. Petitioner observes that,

> Noteworthy to the trial court were the facts that the driver of the vehicle had just engaged the police in a high speed chase and that there were individuals in the immediate area who were "yelling and shouting at the officer." Petition at 3-4.

But as the Court of Appeals pointed out,

> Trooper Collins testified that the persons gathered in the yard where the driver's vehicle was stopped were yelling at the police and saying things to the driver and the petitioner. We find it highly significant, however, that the State has proffered no evidence as to the genesis of the yelling, what was being said, even whether the persons were reacting in favor of the petitioner or the police. *Id.* at 26a.

Indeed, as the Court of Appeals also noted,

> In this case, the observations and testimony concerning the events leading up to the stop all focused on the actions of the driver of the automobile; this testimony in no way detailed what the petitioner did to warrant his detention. *Id.* at 36a.

In sum, the police in this case failed to provide a specific objectively reasonable factual basis for the seizing of Respondent.

Petitioner also relies on a series of cases which it characterizes as rejecting as irrelevant the "subjective intention" of the officer. *United States v. Mangum*, 100 F.3d 164 (D.C. Cir. 1996) is representative of these cases. The court noted that "Appellant concedes that the police officers' corroboration of the informant's tip provided reasonable articulable suspicion for an investigative *Terry* stop of the vehicle and pat-down of its occupants." *Id.* at 168. It was in this context that the court said,

> Finally, even if appellant had produced evidence showing that the officers intended to arrest Appellant prior to stopping him an finding the gun, such evidence would be irrelevant. In determining whether a stop or search is reasonable under the Fourth Amendment, courts look to objective evidence, not subjective intentions. *Whren v. United States*, --- U.S. ---, ----, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) (rejecting the proposition that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."); *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879 (adopting objective standard for determining reasonableness of searches or seizures under the Fourth Amendment). (footnote omitted). *Id.* 169.

The *Mangum* line of cases thus stands for the unexceptionable proposition that after a specific reasonable basis for the stop has been demonstrated the fact that the officer had some other motive in mind is irrelevant.

In the case at bar, there was a failure to establish a reasonable basis for the seizing of Respondent. Thus, the *Mangum* issue that a facially proper stop may actually be a pretext has nothing whatsoever to do with this case.

Petitioner also urges this Court to revisit *Maryland v. Wilson*, --- U.S. --- , 117 S.Ct. 882 (1997). The first problem is procedural. Petitioner originally requested that this court grant a petition on the basis of *Whren v. United States*, --- U.S. ---, 116 S.Ct. 1769 (1996) and *Wilson*, *supra*. (pending at the time of the first petition). This Court remanded the case to the Court of Appeals solely for reconsideration on the basis of *Whren*. Unaccountably, Petitioner now contends that Court of Appeals should have reconsidered its decision on the basis of *Wilson*. To borrow from Petitioner, "It goes almost without saying that the Court, in granting a writ of

certiorari [on the basis of *Whren* alone] rejected" Petitioner's claim as to *Wilson*. Petition at 7.

Petitioner's arguments on the facts and the law are no better. Factually, the case does not present the problem of whether Respondent could be ordered to stay in the car without any specific reason.

Foskey testified that only after Respondent exited the vehicle, shut the door, started to walk away, *and* ignored an order to stop, did Foskey assault Respondent. Trooper Collins stated that "both subjects did exit against our commands, so we asked them just to get down." Thus, Foskey acted because Respondent walked away -- whether Respondent was entitled to get out of the car is irrelevant. Indeed, Foskey could not have acted on any other basis. If Respondent had stopped rather than walked away, there would have been no reason for Foskey's attack.

Petitioner claims,

> To apply *Wilson* to this case represents only a slight, but logical, extension of that case, and one that fully accords with *Wilson's* undergirding rationale. Petition at 16.

This claim demonstrates a fundamental misunderstanding of both *Wilson* and logic. *Wilson* extended the rule enunciated in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), that whenever an automobile is lawfully stopped the driver may be ordered out of the vehicle, to passengers. In *Mimms* it was conceded there was "nothing unusual or suspicious" about Mimms's behavior. *Id.* at 109. The theory was that in every case, without regard to specific facts, the driver could be ordered out of the car

on the basis of officer safety. This *per se* rule precludes having a *per se* rule that drivers and passengers may be ordered to stay in the automobile. Either officer safety mandates a *per se* rule of in or out, it cannot logically mandate both. Thus, *Wilson* is relevant only to the extent that it mandates that police may not order the passenger to remain in the automobile without some articulable reasonable basis.

In sum, Petitioner has failed to articulate any substantial reason for this Court to issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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